

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL)
PRESCRIPTION)
OPIATE LITIGATION,) Judge Polster
) Cleveland, Ohio
Plaintiffs,)
) Civil Action
) Number 1:17MD02804
)
APPLIES TO ALL CASES)

- - - - -

TRANSCRIPT OF PROCEEDINGS HAD BEFORE

THE HONORABLE DAN AARON POLSTER

JUDGE OF SAID COURT,

ON MONDAY, OCTOBER 5, 2020

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Official Court Reporter: Shirle M. Perkins, RDR, CRR
U.S. District Court
801 West Superior, #7-189
Cleveland, OH 44113-1829
(216) 357-7106

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 APPEARANCES:

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9 Also Present:

10 For Cuyahoga County: HUNTER SHKOLNIK, ESQ.,

11 For Summit County: JOE RICE, ESQ.,

12 For Pharmacy Defendants: KASPAR STOFFELMAYR, ESQ.,

13 For HBC/Giant Eagle: ROBERT M. BARNES, ESQ.,

14 For Rite Aid: KELLY MOORE,

15 For Walmart: TINA TABACCHI,

16 Also Present: SPECIAL MASTER DAVID COHEN

17 MAGISTRATE JUDGE DAVID RUIZ

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1 MONDAY SESSION, OCTOBER 5, 2020, AT 12:53 P.M.

2 THE COURT: All right. Dan Polster calling in.

3 LAW CLERK: Hi, Judge.

4 We've got everyone from the parties and the Court
13:03:09 5 Reporter is on and Magistrate Judge Ruiz is on as well.

6 THE COURT: Okay. All right. Good afternoon,
7 everyone.

8 This is a monthly status conference call in the Opioid
9 MDL, particularly the Track with the Plaintiffs and the
13:03:30 10 pharmacies.

11 Our Court just met, the Judges just met this morning.
12 We had two criminal trials, short criminal trials
13 successfully completed in the last couple of weeks, and we
14 voted to continue trials but with the same limitations that
13:03:57 15 we've had; that being trials that don't exceed five days,
16 five trial days, and permitting counsel or parties to
17 interpose any objections based on COVID. So with those
18 limitations, we obviously cannot proceed with the Track 1B
19 trial as scheduled on November 9th. And I think those -- I
13:04:33 20 want to make sure everyone stays safe and I certainly don't
21 want to start a trial that we might not be able to continue.

22 So that was the sense of all the Judges and to proceed
23 cautiously. So that's what we're doing.

24 So I had obviously given a lot of thought that this,
13:04:57 25 you know, to what might occur, what we might decide to do if

1 the Court maintained those limitations and couldn't go
2 forward with Track 1B in November.

3 So this is what I've decided to do. No one can gauge
4 what the course of this pandemic is. It's taken longer than
13:05:20 5 a lot of people thought for it to get under control.

6 The situation in January and February is not likely to
7 be dramatically different than November and December. And
8 also even without COVID, it would be foolish, in my opinion,
9 to have a one-month or five-week jury trial in Cleveland,
13:05:44 10 Ohio, in January or February. So that means the earliest we
11 could schedule this would be, say, middle of March. All
12 right.

13 If you run Track 1B starting the middle of March, it's
14 going to run right into Track 3 in early May and that would
13:06:04 15 be unworkable. So that doesn't make sense.

16 So what I am -- what I've decided to do is to just
17 postpone Track 1B, and we will try Track 3 as scheduled. I
18 think it's May 9th, and all those dates are replaced. And
19 that has a number of advantages.

13:06:36 20 I never wanted to have two Northern District of Ohio
21 Bellwether trials with the pharmacies, and my hope is we
22 won't need any, that the parties will work out a settlement.
23 But, if it turns out that the parties need a Bellwether
24 trial, you know, to clarify what -- how this controversy is
13:06:59 25 going to appear in front of the jury, it makes sense to have

1 a trial that has all of the claims against the pharmacies,
2 not just half of them. Track 3 has and Track 1B doesn't.
3 So that's what I'm going to do.

4 So we're postponing 1B and we're going to proceed with
13:07:21 5 Track 3 as scheduled in May. And certainly everyone hopes
6 that by then, that's another six, seven months from now,
7 we'll be able to basically have long trials.

8 Now, there are a number of -- I mean the Court is
9 still working on the jury instructions and the verdict
13:07:50 10 forms, which would be virtually identical, other than
11 substituting different counties for Track 3 as it was for
12 1B. And when I have those finalized, I'll send those to the
13 parties.

14 There are a number of motions in limine that are fully
13:08:09 15 briefed. I'll look at those. The ones that are going to be
16 applicable to Track 3, I will go ahead and decide. No point
17 waiting until May. They're briefed, I'll decide those. The
18 ones that don't seem to be applicable to Track 3, obviously
19 I'm not going to worry about.

13:08:26 20 There are some objections to the Special Master's
21 orders that apply to Track 3. I'll obviously, when those
22 are fully briefed, I will address those.

23 I think the further advantage of this schedule is it
24 allows the parties more time for settlement discussions, and
13:08:53 25 I would urge both sides to redouble their efforts.

1 So other than scheduling a call for next month, I
2 don't believe we have anything else on my agenda. This was
3 the main purpose of having this call as soon as our Judges
4 met. I know everyone has been geared up for this November
13:09:24 5 trial, and again, I'm disappointed we can't go forward, but
6 again, our Court collectively, and I certainly joined in
7 that, want to make sure that we do what we can to keep
8 people safe. I care about each and every one of you. I
9 care about the safety and health of my staff and court
13:09:50 10 employees, the safety of jurors, the safety of witnesses.
11 That's what we're doing.

12 So does anyone want to raise anything or bring
13 anything else up that we should attend to?

14 MR. WEINBERGER: Your Honor, this is Pete
13:10:13 15 Weinberger on behalf of the Plaintiffs.

16 I can't think of anything at this time, but if there's
17 anybody else on the Plaintiffs' team that wants to bring
18 anything up, I invite them to do so at this point.

19 MR. RICE: Judge, this is Joe Rice. I think
13:10:35 20 we would like to have the Court give us a little time to
21 think through all this.

22 THE COURT: That's fine.

23 MR. RICE: We would ask that the next status
24 conference be an MDL-wide status conference versus just the
13:10:53 25 Pharmacy Group, which is what we've been doing for CT1 and

1 CT3, sort of have a discussion of where we are in the whole
2 MDL.

3 THE COURT: All right. That's a good
4 suggestion, Joe.

13:11:10 5 I was thinking of having that in 30 days, the
6 beginning of November. I could do it the end of -- I mean
7 we in the past had our status calls the end of the month,
8 which we had in October and in September. I wanted to
9 schedule this one right after the Judges' meeting. So we
13:11:34 10 could have it the end of October, the beginning of November.
11 I don't really have a strong preference. Maybe we could
12 have it -- but I think that's a good idea to have it
13 MDL-wide.

14 MR. STOFFELMAYR: Judge, it's Kaspar
15 Stoffelmayr.

16 Just speaking for myself, if we could do that the
17 first week in November, the week of November 2nd, I think
18 for some of us, our schedules are much more flexible then
19 than they are the week before.

13:12:08 20 THE COURT: All right.

21 Everyone's schedule just opened up because we're not
22 going to be picking a jury that week.

23 MR. STOFFELMAYR: Exactly. That was the
24 subtext of that.

13:12:24 25 THE COURT: Yeah.

1 What I'm going to suggest -- I'm going to suggest
2 Wednesday, November 4th. I got a number of -- I could do it
3 Monday. I could do it either Monday, the 2nd, or Wednesday,
4 the 4th. I'm avoiding Tuesday. It's Election Day and who
13:12:58 5 knows what kind of day that's going to be in Federal Court.
6 So I'm going to leave that date clear for obvious reasons.

7 So does anyone have a strong, you know, either the 2nd
8 -- I'm proposing either the 2nd or the 4th.

9 COUNSEL: The 4th works better for me, Judge.

13:13:24 10 THE COURT: All right.

11 I don't know who that was, but I'm open either day.
12 So let's see what -- this 1:00 time seems to be okay. We've
13 generally been using 1:00. So why don't we go with 1:00,
14 Wednesday, November 4th.

13:13:57 15 And we generally had status reports like noon on
16 Monday. We've had --

17 MR. WEINBERGER: Your Honor, can I -- this is
18 Pete Weinberger again.

19 With respect to the status report, since I'm generally
13:14:13 20 the one on our side that coordinates it and -- somebody's
21 typing. Could you --

22 THE COURT: Yeah, there's a lot of typing
23 there. If you could mute your typing, please. Thank you.

24 MR. WEINBERGER: Since I coordinate with the
13:14:25 25 other side status reports, I think with the fact that this

1 is going to be MDL-wide, I would suggest that we try to get
2 our status reports in to you the Friday before.

3 THE COURT: Okay.

4 That way, if it needs one day, it's not so terrible.

13:14:47 5 Okay. So that would be like the 30th.

6 MR. WEINBERGER: Right.

7 THE COURT: All right.

8 Why don't we make it 3:00 on the 30th; 3:00 P.M.,

9 Friday, the 30th. That's a good idea. Okay. And we'll

13:15:18 10 make it clear this is MDL-wide. So that's a good idea.

11 There may be some other issues.

12 MR. WEINBERGER: Your Honor, this is Pete
13 again. After our call, I'll send a letter, a notice to the
14 Defendants, the Defendant-wide list, indicating that.

13:15:39 15 THE COURT: Good idea. Thank you, Pete.

16 I had one question. I know I'm not asking for any
17 details of the contents of the settlement discussions, but I
18 would like to know if the -- if the AG's or any
19 representatives of the AG's are involved in those
13:16:06 20 discussions or if it's just what I'll call the PEC
21 subdivisions and the pharmacies?

22 MR. RICE: Judge, this is Joe.

23 From the PEC's point of view, we're not aware of any
24 discussions involving the Attorney Generals with Judge
13:16:28 25 Gandhi and the pharmacies.

1 THE COURT: Okay. Thanks.

2 Because I know that most of this -- the state cases
3 didn't involve the pharmacies, only a few did. Okay. Thank
4 you, Joe.

13:16:44 5 MR. RICE: I guess I'd like to get
6 confirmation from the pharmacies on that.

7 THE COURT: Yeah. I just want to know if this
8 is -- if this is bilateral or trilateral.

9 MS. TABACCHI: Your Honor, it's Tina Tabacchi
13:17:00 10 at Jones Day.

11 So far, our conversations with Judge Gandhi have
12 involved the PEC. I don't have any additional information
13 on that for you.

14 THE COURT: All right. That's fine, Tina. I
13:17:17 15 just wanted to -- I was curious. So that's fine. Okay.

16 Anything else that anyone wants to bring up?

17 MR. STOFFELMAYR: Judge, it's Kaspar on the
18 Defense side.

19 THE COURT: Okay. All right.

13:17:42 20 Well, thank you. And again, this has obviously been,
21 you know, an issue that our Court has spent a lot of time
22 on, and we are operating collectively, as I think any Court
23 should. No Judge in our Court is freelancing. And we
24 deliberate carefully, and we try to reach consensus to
13:18:11 25 balance all of our competing interests. But obviously,

1 safety with everyone is foremost in our minds and can be and
2 always should be, so.

3 MR. WEINBERGER: Your Honor, this is Pete
4 Weinberger.

13:18:26 5 THE COURT: Yes, Pete.

6 MR. WEINBERGER: If I could interrupt for just
7 one moment.

8 There are a number of deadlines in the CT 1B case
9 management and trial order between now and the trial.

13:18:43 10 Should we work with Special Master Cohen to determine
11 whether or not those -- any of those deadlines still apply
12 or should we just assume they're stayed at this point?

13 THE COURT: Well, I mean certainly we're not
14 picking a jury. So anything relative to that.

13:19:03 15 MR. WEINBERGER: There's issues involving
16 depo -- deposition designations and objections and that.

17 THE COURT: Right. Well, right. Those are --
18 I mean those are -- those are stayed because we're not
19 trying that case.

13:19:21 20 MR. WEINBERGER: Right.

21 THE COURT: So I believe we have comfortable
22 deadlines in place for Track 3. And so if the -- if they're
23 not there, you need to work through those with Special
24 Master Cohen and get them in place. But those will be the
13:19:47 25 deadlines that we'll have.

1 MR. WEINBERGER: Understood. Thank you, your
2 Honor.

3 THE COURT: Again, I would expect that the --
4 we'll have the same experts, so we won't need any more
13:19:59 5 Daubert motions. And a lot of the witnesses will be the
6 same. Obviously we're not going to have witnesses in
7 Cuyahoga and Summit County. We'll have corresponding
8 witnesses from Lake and Trumbull. But, yeah, that -- the
9 trial specific deadlines are off. But, if you have any
13:20:26 10 question, you can work those out with Special Master Cohen.

11 SPECIAL MASTER COHEN: Judge, this is David.

12 I'm looking at the -- all of the deadlines between now
13 and trial. I think the next one was October 14th for trial
14 briefs, and I don't see any deadlines that I believe the
13:20:46 15 parties need to adhere to in Track 1B, but if anybody thinks
16 that I'm missing something, they should contact me and we'll
17 figure it out.

18 THE COURT: Okay. Thanks, David.

19 MR. SHKOLNIK: Judge Polster, this is Hunter
13:21:06 20 Shkolnik on behalf of Cuyahoga. Good afternoon.

21 There was a followup to what Special Master Cohen just
22 said. There are some issues involving Cuyahoga discovery
23 that was still on the agenda, disputes that we were having
24 with some Plaintiffs.

13:21:21 25 Since we're not going forward to trial, should we

1 assume that there should be a stand down on those issues as
2 well?

3 THE COURT: I see no reason to press those,
4 Hunter, because that trial's way off, and candidly, I hope
13:21:40 5 it will never be necessary, but if and when it should be, if
6 there's still discovery disputes, they can be reactivated or
7 moved back on to the front burner. But I don't see any
8 reason -- unless someone sees a compelling reason to spend
9 time on them now, I don't.

13:21:59 10 MR. SHKOLNIK: Thank you. We don't see any
11 reason for that. I just wanted to get that on the record.
12 Thank you.

13 THE COURT: Okay.

14 I agree. We should just defer those and save the time
13:22:09 15 and money and effort.

16 MR. SHKOLNIK: Thank you.

17 THE COURT: Okay. Thanks, everyone, and stay
18 safe.

19 MR. WEINBERGER: Thank you, Judge.

13:22:30 20 (Proceedings adjourned at 1:22 p.m.)

21 C E R T I F I C A T E

22 I certify that the foregoing is a correct
23 transcript from the record of proceedings in the
above-entitled matter.

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